Supreme Court, U.S.
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No. 91-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES A. RAY,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 10 and issue a writ of certiorari where no genuine conflict exists between the decision below and any ruling of this Court or other Circuit Courts of Appeals, and where the Petition fails to present special and important reasons for review.

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Supreme Court Rule 10 7

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RESPONDENT'S BRIEF IN OPPOSITION

SUPPLEMENTAL JURISDICTIONAL STATEMENT

The Petitioner incorrectly premised this Court's jurisdiction upon 28 U.S.C. § 2101(c). This Court's jurisdiction properly is invoked pursuant to 28 U.S.C. § 1254.

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* Consolidated Rail Corporation is a corporation without any subsidiaries or affiliates. None of its stockholders are publicly held companies owning 10% or more of the stock.

SUMMARY OF ARGUMENT

This case involves the fundamental rule that this Court's review of an issue on writ of certiorari is warranted only where the Petition establishes special and important reasons for such consideration. *See* Supreme Court Rule 10. The issue decided below by the Seventh Circuit, whether emotional injuries are compensable under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 under the circumstances alleged in Petitioner's complaint, does not warrant this Court's review for several reasons. First, in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court urged the lower federal courts to analyze and develop the law on the emotional injury issue by scrutinizing the specific factual allegations as presented. That is precisely what was done by the district court and Seventh Circuit below. Second, no conflict exists between the Seventh Circuit's decision below and the decisions of this Court. Third, no conflict is present between the Seventh Circuit's holding below and the developing FELA law of any other Circuit decided after this Court's ruling in *Buell*. Finally, Petitioner has failed to present any principled reason for this Court's review of this matter.

This Court has consistently denied post-*Buell* petitions addressing the FELA emotional injury issue.[1] This Petition presents no reason for a different result.

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[1] *Holliday v. Conrail*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 970 (1991); *Hammond v. Terminal R.R. Ass'n of St. Louis*, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340 (6th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO DEMONSTRATE A GENUINE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS

A. The Lower Federal Courts Properly Have Tailored Their Rulings To The Factual Allegations Of Each Case And Have Declined To Announce Broad Rules Of Law

This Court, in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), expressly left open the question of under what factual circumstances one may recover for purely emotional injuries under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. In *Buell*, this Court properly declined to announce a broad rule of law upon that issue. This Court further cautioned that the question of whether emotional injuries are compensable under the FELA is not a pure question of statutory construction, but will depend "on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.* at 568. In the short time since this Court decided *Buell*, federal district and circuit courts have been fleshing out the law and its application to specific factual circumstances and have resisted creating broad rules of law or public policy.

Petitioner erroneously contends that there is a conflict among the Circuits created by the instant case and the Fifth Circuit's decision in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991) and the Ninth Circuit's decision in *Taylor v. Burlington Northern Ry. Co.*, 787 F.2d 1309 (9th Cir. 1986). Plaintiff's argument is unmerited, however, as he significantly misapprehends the precedential value of those decisions.

In *Plaisance*, an action arising under the Jones Act, the Fifth Circuit's review was limited to the narrow factual allegations of the complaint. The Fifth Circuit affirmed the district court's dismissal of the complaint because the plaintiff's injury was "not a reasonably foreseeable consequence of the alleged negligence." *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1011 (5th Cir. 1991). The Fifth Circuit's disposition of Plaisance's claim thus was based upon long-standing principles of the law of negligence and did not create a broad new rule of law despite its purported "holding". Moreover, it is important to note that the complaint in *Plaisance* failed to allege a threat of physical impact.

Petitioner also contends that the Ninth Circuit's decision in *Taylor v. Burlington Northern Ry. Co.*, 787 F.2d 1309 (9th Cir. 1986), creates a conflict, but *Taylor* was decided before this Court's decision in *Buell*. Thus, at the time of its holding in *Taylor*, the Ninth Circuit presumed that it was bound by its prior *Buell* ruling which subsequently was undercut by this Court's statement that "there was no reason for the Court of Appeals to express an opinion on this [emotional injury] issue." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 570 (1987).

The remaining Circuit Courts of Appeals have not been presented with factual allegations warranting the issuance of broad policy pronouncements on emotional injury issues. There are no opinions from these Circuits which Petitioner contends create any conflict. Thus, no genuine conflict exists among the Circuit Courts of Appeals.

Several federal district courts have discussed whether and under what circumstances emotional injury claims may be asserted under the FELA. *See, e.g., Gottshall v.*

Consolidated Rail Corp., ____ F.Supp. ____, No. 89-3102 (E.D. Pa. Sept. 30, 1991) (LEXIS Genfed Library, Dist. file), *appeal docketed*, No. 91-1926 (3d Cir. Oct. 31, 1991); *Gemmel v. Consolidated Rail Corp.*, No. 2:89-1066 (S.D. Ohio April 12, 1991) (LEXIS Genfed Library, Dist. file); *Teague v. National R.R. Passenger Corp.*, 708 F. Supp. 1344 (D. Mass. 1989); *Amendola v. Kansas City Southern Ry.*, 699 F.Supp. 1401 (W.D. Mo. 1988); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987). These district court decisions reflect the development of the law of FELA emotional injury claims exactly as this Court expected—a case by case analysis of the specific facts alleged.

Petitioner's staunch reliance on district court opinions, and the *Teague* case in particular, is wholly misplaced and illustrates the prematurity of this Petition, in light of the developing state of the law on this recently proposed cause of action. Until the Circuit Courts of Appeals are presented with proper opportunities to create rules of law, and until those rules of law are in conflict among the Circuits, there is no particular FELA emotional injury issue which is ripe for review by this Court.

B. The Opinion Below Is Manifestly Correct And Is Consistent With The *Buell* Decision Of This Court And With The Decisions Of Other Circuit Courts Of Appeals

In *Buell*, this Court expressly reserved the issue of under what circumstances purely emotional claims may be compensable under the FELA, allowing the lower federal courts to develop the law in this area. Thus, by declining to rule on the issue, this Court wisely chose not to create a rule of law prematurely that would serve only to prompt subsequent petitions to this Court. In light of

this developing state of the law, Petitioner's claim that the Seventh Circuit's opinion conflicts with this Court's opinion is unfounded. Indeed, the Seventh Circuit scrutinized the applicability of *Buell* in the opinion below and in *Hammond v. Terminal R.R. Ass'n of St. Louis*, 848 F.2d 95, 98 (7th Cir. 1988). The Seventh Circuit properly concluded that *Buell* was not dispositive of the issue of when purely emotional injuries may be compensable under the FELA. Thus, the Seventh Circuit's opinion in this matter is consistent with the opinions of this Court.

Moreover, the opinion of the Seventh Circuit in this matter is not in a genuine conflict with the decisions of other Circuit Courts of Appeals. No Circuit Court of Appeals post-*Buell* has allowed recovery for a purely emotional injury, which did not result from a physical threat or impact. The absence of conflicting opinions demonstrates that the Seventh Circuit's ruling below on the facts before it is faithful to the language and purpose of the FELA. The ruling of the Seventh Circuit also is supported by sound public policy. Any contrary decision, escalating everyday employment disputes into FELA cases, would wreak havoc on the statutory scheme and open the floodgates of litigation.

Other Circuits have rendered opinions consistent with the Seventh Circuit's opinion below, which suggests the propriety of that decision. In *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 79 (3d Cir. 1991), the Third Circuit denied relief under the FELA for emotional injuries lacking any physical impact. Similarly, in *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987), the Sixth Circuit held that a claim of an intentional tort resulting in purely emotional injury is not cognizable under the FELA.

These decisions of the Circuit Courts of Appeals denying relief under the FELA in the absence of threatened or actual physical impact are entirely consistent with the Seventh Circuit's ruling below.

II.

THE PETITION ALSO FAILS TO PRESENT SPECIAL AND IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

Review by this Court on writ of certiorari is not a matter of right, but is subject to judicial discretion. Review by this Court of a decision is proper only in the presence of special and important reasons. Such special and important reasons for review include a conflict between that decision and a decision of this Court, a conflict between that decision and a decision of another Circuit Court of Appeals, and a need for a ruling by this Court to settle an important question of federal law. *See* Supreme Court Rule 10. Petitioner has failed to establish any special and important reasons for this Court to review the decision of the Seventh Circuit below.

The Seventh Circuit's decision in this matter is not in conflict with the established law of any other Circuit post-*Buell* or with any rule of law established by this Court. In addition, the Seventh Circuit's reasoning properly interprets the FELA and is consistent with other decisions. Moreover, the issue presented does not warrant review by this Court at this time. Indeed, this Court repeatedly and prudently has declined to review decisions of Circuit Courts of Appeals applying FELA principles to various fact situations, allowing instead the Circuit Courts of Appeals the opportunity to analyze each case on its own merits. No particular FELA emotional injury issue will be ripe for review by this Court until the Circuit Courts

of Appeals have had the opportunity to establish rules of law on the matter. Thus, the Petition fails to present any principled basis for this Court to depart from its prior denials of similar writs.

This case certainly does not present one of the few special and important matters warranting this Court's review. The Petitioner's liberty is not at stake and no rights of the Petitioner have been deprived or prejudiced. Moreover, this case does not possess far-reaching consequences. Thus, special and important reasons for review on writ of certiorari are conspicuously absent from this matter.

CONCLUSION

Pursuant to sound policies of judicial administration, this Court repeatedly has declined to establish a rule of law which has not been subject to adequate scrutiny by the Circuit Courts of Appeals. The issue Petitioner seeks to present to this Court is not a matter of pure statutory construction to be decided by this Court; it merely involves the application of developing FELA law to a set of specific factual allegations. Moreover, there exists no conflict among the Circuits. The instant Petition, in light of this Court's pronouncements in *Buell*, is premature. Petitioner's anxious plea to close the door on the comprehensive development of federal common law will lead only to discordance and divergences from the law once established, thus requiring further review by this Court and

piecemeal litigation. Accordingly, and for the reasons set forth above, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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